

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

EDWARD SOFOWORA,)	1:05-cv-00043-OWW-TAG-HC
)	
Petitioner,)	
)	REPORT AND RECOMMENDATION TO
v.)	GRANT EMERGENCY MOTION FOR STAY
)	OF FINAL ORDER OF DEPORTATION (Doc
)	10)
JOHN ASHCROFT, et al.,)	
)	ORDER DENYING MOTION FOR
)	APPOINTMENT OF COUNSEL (Doc. 10)
Respondents.)	
_____)	

Petitioner, currently in the custody of the Bureau of Immigration and Customs Enforcement (“ICE”) and proceeding pro se, has filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241. (Doc. 1).

A. Petition for Writ of Habeas Corpus

Petitioner filed a petition for writ of habeas corpus on January 10, 2005, in which he asserts that he is a citizen of Nigeria, and an “alien” subject to a final order of deportation, exclusion, or removal, who, pursuant to 28 U.S.C. § 2241, is being mandatorily detained by ICE in the Kern County Jail during his “detention” period. (Doc. 1, pp. 2-3). Petitioner asserts that he is not awaiting trial or serving a sentence on any state or federal criminal case. (Doc. 1, p. 4). Petitioner challenges his mandatory detention as violative of his Fifth Amendment substantive

1 and procedural due process rights. (Doc. 1, p. 4). Petitioner seeks immediate release from
2 custody under reasonable conditions of supervision. (Doc. 1, p. 5).

3 On May 3, 2005, the Court issued an Order to Show Cause why the petition should not be
4 granted. (Doc. 9). In that order, the ICE has been ordered to file a response within forty-five
5 days. (Id.).

6 **B. Motion for Injunctive Relief**

7 On May 13, 2005, Petitioner filed an “Emergency Motion for Stay of The Final Order of
8 Deportation Pending Judicial Review of Petition For Writ of Habeas Corpus” (“motion for
9 stay”), accompanied by a motion for appointment of counsel. (Doc. 10). A motion for stay
10 pending a district court’s review of the petition for writ of habeas corpus on the merits is
11 reviewed under the same standards employed in evaluating motions for preliminary injunctive
12 relief. Andreu v. Ashcroft, 253 F.2d 477 (9th Cir. 2001); see also Zegarra-Gomez v. INS, 314
13 F.3d 1124, 1125 (9th Cir. 2003). The petitioner must show “either a probability of success on the
14 merits and the possibility of irreparable injury, or that serious legal questions are raised and the
15 balance of hardships tips sharply in petitioner’s favor. Andreu v. Ashcroft, 253 F.3d at 480
16 (quoting Abbassi v. INS, 143 F.3d 513, (9th Cir. 1998).)

17 In Petitioner’s emergency motion for a stay, Petitioner contends that the Board of
18 Immigration Appeals and the Immigration Judge impermissibly deprived him of his due process
19 rights by failing to inform him of various legal options, e.g., adjustment of status and a waiver of
20 removal by the Attorney General, purportedly available to him at the time the original
21 deportation order was issued. (Doc. 10, p. 2). Petitioner’s allegations raise a probability of
22 success on the merits and the fact of his deportation prior to a ruling on the instant petition for
23 writ of habeas corpus demonstrates irreparable harm. Accordingly, on balance Petitioner has met
24 his burden of demonstrating a probability of success on the merits and the possibility of
25 irreparable injury; therefore, the Court RECOMMENDS that the stay be GRANTED.¹

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27 ¹ In this motion, Petitioner also requests that the Court release him on bond or on his own recognizance.
28 (Doc. 10, p. 2). The Court reserves its ruling on this request, until Respondent has had the opportunity to address the
issue when it files its response.

1 failure to file objections within the specified time may waive the right to appeal the Order of the
2 District Court. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

3
4 IT IS SO ORDERED.

5 **Dated: May 18, 2005**
6 j6eb3d

/s/ Theresa A. Goldner
UNITED STATES MAGISTRATE JUDGE